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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 516

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

O. G. RICHTER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 17, 1940
CERTIORARI GRANTED NOVEMBER 18, 1940

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vs.

O. G. RICHTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 92208

O. G. RICHTER, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Petitioner: Richard H. Wilmer, Esq., Douglas L. Hatch, Esq. For Respondent: Hugh Brewster, Esq.

Docket entries

1938

Feb. 5—Petition received and filed. Taxpayer notified. (Fee paid.)
Feb. 7—Copy of petition served on General Counsel.
Apr. 6—Answer filed by General Counsel.
Apr. 6—Request for Circuit hearing in Pittsburgh, Pa., filed by General Counsel.
Apr. 11—Notice issued placing proceeding on Pittsburgh Calendar. Answer and request served.
May 6—Motion for change in designation of place of hearing from Pittsburgh, Pa. to Washington, D. C. Calendar filed by taxpayer. 5/9/38 granted.
Oct. 14—Hearing set Dec. 6, 1938.
Dec. 6—Hearing had before Mr. Black. Stipulation of facts filed. Petitioner's brief due 1/5/39. Commissioner's brief due 2/4/39. Petitioner's reply due 2/20/38.
Dec. 16—Transcript of hearing 12/6/38 filed.

1939

Jan. 5—Brief filed by taxpayer. 1/6/39 copy served.
Jan. 30—Brief filed by General Counsel.
Feb. 18—Reply brief filed by taxpayer. 2/18/39 copy served.
June 12—Memorandum opinion rendered—C. R. Arundell, Division 7. Decision will be entered under Rule 50.
July 11—Computation of deficiency filed by Commissioner.
July 13—Hearing set Sept. 6, 1939, on settlement.
July 17—Consent to settlement filed by taxpayer.
July 24—Decision entered—C. R. Arundell, Division 7.
Oct. 13—Petition for review by U. S. Circuit Court of Appeals, Third Circuit, with assignments of error filed by General Counsel.
Oct. 23—Proofs of service filed by General Counsel (2).
Dec. 5—Motion for extension to 5/1/40 to prepare and transmit record filed by General Counsel.
Dec. 5—Order enlarging time to 5/1/40 to prepare and transmit record entered.

2 1940

Apr. 20—Statement of points filed by General Counse with proof of service thereon.

Apr. 20—Designation of portions of record, proceeding and evidence to be contained in the record filed by General Counsel, proof of service thereon.

Apr. 20—Objections to inclusion of "Statement of Points" in record on appeal filed by taxpayer; proof of service thereon.

Apr. 20—Designation of additional portions of the record to be included in record on appeal filed by taxpayer—proof of service thereon.

3 Before United States Board of Tax Appeals

[Title omitted.]
[File endorsement omitted.]

Petition

Filed Feb. 5, 1938

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:B:I:VMW–90D), dated November 9, 1937, and as a basis for his proceeding alleges as follows:

1. The petitioner is an individual with his residence located at 5454 Kipling Road, Pittsburgh, Pennsylvania.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on November 9, 1937.

3. The taxes in controversy are income taxes for the cal-
4 endar year 1934 in the amount of $3,232.13, being the amount of the deficiency asserted by the respondent.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue erred in including in the income of petitioner the net income arising under the trust established by the petitioner on December 29, 1930, as amended June 3, 1932, the beneficiary of which was his wife, Nannie C. Richter.

(b) The Commissioner of Internal Revenue erred in refusing to allow the petitioner a credit of $112.50 for foreign income taxes paid for the year 1934 on dividends of $2,250.00 from sources in Canada.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On December 29, 1930, petitioner established a trust making The Union Trust Company of Pittsburgh, a corporation of the Commonwealth of Pennsylvania, trustee thereunder and naming his wife, Nannie C. Richter, the beneficiary of the net income arising under the trust, as amended on June 3, 1932, and entitled to distribution of such net income.

(b) Said trust continued unrevoked throughout the en-
5 tire taxable year 1934. The beneficiary, Nannie C. Richter, was alive during the entire year, received the entire net

income therefrom and paid in full her Federal income taxes on such net income. Consequently the net income arising from said trust was not income taxable to the petitioner.

(c) Attached hereto and marked Exhibit B is a copy of the instrument executed December 29, 1930, establishing the trust. Attached hereto and marked Exhibit C is a copy of the amendment to said trust executed June 3, 1932. By and under the terms and provisions of the trust income arising therefrom is not taxable as income to the petitioner, irrespective of the provisions providing for revocation of the trust or reversion of the corpus thereof or any other term or provision thereof.

(d) Income in the amount of $2,250.00 was received by petitioner during the year 1934 in the form of dividends from stocks in Canadian corporations, and upon such dividends there was paid by petitioner to the Dominion of Canada a total of $112.50 as income tax, and accordingly a credit of $112.50 was properly allowed to the petitioner for the year 1934 and was erroneously disallowed as a credit by the Commissioner of Internal Revenue.

6 Wherefore, the petitioner prays: That the Board may hear and determine his appeal; that the Board may find there is no deficiency in income tax of the petitioner for the year 1934; that the Board may find net income arising under the trust established December 29, 1930, as amended, was not income to petitioner; and that the Board find that income taxes paid on foreign income in the amount of $112.50 was properly allowable as a credit.

RICHARD H. WILMER,
DOUGLAS L. HATCH,
Attorneys for Petitioner,
Transportation Building,
Washington, D. C.

7 [*Duly sworn to by O. G. Richter; jurat omitted in printing.*]

8 *Exhibit A to petition*

TREASURY DEPARTMENT,
Washington, Nov. 9, 1937.

1091M. SN–N. Office of Commissioner of Internal Revenue. Address Reply to Commissioner of Internal Revenue and Refer to

Mr. O. G. RICHTER,
5454 Kipling Road, Pittsburgh, Pennsylvania.

SIR: You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1934, discloses a deficiency of $3,232.13 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

By (Signed) CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement.
Form 870.

9 STATEMENT

IT:B:1.
VMW-90D.

IN RE MR. O. G. RICHTER, 5454 KIPLING ROAD, PITTSBURGH, PENNSYLVANIA

Tax Liability for Taxable Year Ended December 31, 1934

Income tax, liability $41,988.87; assessed $38,756.74; deficiency $3,232.13.

Reference is made to the report of the internal revenue agent in charge at Pittsburgh, Pennsylvania, covering your income tax liability for the taxable year ended December 31, 1934.

In Bureau letter dated March 12, 1937, you were advised of adjustments in your net income, resulting in a deficiency of $3,232.13. Extensions to October 1, 1937, were granted within which you might file information in connection with the application of articles 131–3 of Regulations 86 relating to the Revenue Act of 1934. In regard to the request contained in your letter dated October 28, 1937, that a further extension to December 1, 1937, be granted for the filing of your protest, you are advised that in view of the long period of time allowed for the filing of your protest, it is impracticable for this office to grant your re-

quest. Therefore, this notice is issued as required by the Revenue laws.

In accordance with the decision entered by the United States Board of Tax Appeals on October 8, 1937, in connection with your case for the taxable year ended December 31, 1931 (Docket #81640), it is held that the sale of securities to your wife in 1931 was an actual sale for income tax purposes and, therefore, the income received in 1934 from these securities is not taxable in your separate return for 1934.

The adjustments in your tax liability disclosing a deficiency of $3,232.13 as shown in Bureau letter dated March 12, 1937, has been sustained.

Against the amount of total tax shown on your return, a credit of $112.50 was claimed for foreign income tax paid for the year 1934 on dividends of $2,250.00 from sources in Canada.

10 Article 131–3 of Regulations 86 relating to the Revenue Act of 1934 provides that if a taxpayer signifies in his individual return his desire to claim credit for income tax paid other than to the United States, the income tax return must be accompanied by form 1116 carefully filled in with all the information there called for and with the calculations of credits there indicated, and the form must be duly signed and sworn to or affirmed. If credit is sought for taxes already paid, the form must have attached to it the receipt for each such tax payment. If credit is sought for taxes accrued, the form must have attached to it the return on which each such accrued tax was based. This receipt or return so attached must be either the original, a duplicate original, a duly certified or authenticated copy or a sworn copy.

Inasmuch as the evidence required by the provisions of article 131–3 of Regulations 86 has not been furnished, the amount of $112.50 claimed against total tax as a credit for foreign income tax has been disallowed.

A recomputation of your net income and income tax liability follows:

Net income reported			$117,286.19
Add:			
Net income of the O. G. Richter Trust for Nannie C. Richter:			
Interest on tax-free covenant bonds	$3,545.00		
Dividends	2,452.50		
Other income	691.22		
Total		$6,688.72	
Less:			
Capital loss	$555.58		
Taxes paid	60.51		
Trustees commission	200.07	816.16	5,872.56
Net income adjusted			$123,158.75

11 Computation of Tax

Net Income as adjusted		$123,158.75
Less:		
Personal exemption	$ 2,500.00	
Credit for one dependent	400.00	2,900.00
Income subject to surtax		$120,258.75
Less:		
Dividends	$30,728.20	
Earned income credit	1,400.00	32,128.20
Balance subject to normal tax		$ 88,130.55
Normal tax at 4% on $88,130.55		3,525.22
Surtax on $120,258.75		38,534.55
Total tax		$ 42,059.77
Less: Tax paid at source		70.90
Income tax liability		$ 41,988.87
Income tax assessed, account #200810		38,756.74
Deficiency		$ 3,232.13

Explanation of Changes

In accordance with the recommendation of the revenue agent, your return has been adjusted to include the net income of the trust created by you in 1930 for the benefit of your wife, Nannie C. Richter.

12 The record indicates that under the provisions of section 166 of the Revenue Act of 1934 the trust created by you in 1930 for the benefit of your wife, Nannie C. Richter, was a revocable trust and, therefore, the net income is taxable to the grantor. In accordance with the provisions of the trust instrument, the trust could be terminated by you at any time with consent of the beneficiary and the title to the corpus would revest in the grantor upon the exercise of such power. The trust terminated on January 3, 1936, the corpus reverting to the grantor.

13 Before United States Board of Tax Appeals

[Title omitted.]
[File endorsement omitted.]

Answer

Filed April 6, 1938

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in Paragraph 1 of the petition.

2. Admits the allegations contained in Paragraph 2 of the petition.

3. Admits the allegations contained in Paragraph 3 of the petition.

4. Denies the allegations of error contained in subparagraphs (a) and (b) of Paragraph 4 of the petition.

5. Denies the allegations of fact contained in subparagraphs (a) to (d), inclusive, of Paragraph 5 of the petition.

Denies that petitioner is entitled to the relief prayed for in the final paragraph of the petition.

14 Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

(Signed) J. P. WENCHEL,
G. W. K.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
LOREN P. OAKES,
Special Attorney,
Bureau of Internal Revenue.

15 Before United States Board of Tax Appeals

[Title omitted.]

[File endorsement omitted.]

Stipulation of facts

Filed Dec. 6, 1938

It is hereby stipulated and agreed by and between the parties hereto, the Petitioner acting by and through his attorneys, Richard H. Wilmer and Douglas L. Hatch, and the Respondent acting by J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, that the statements, dates, amounts, items, and exhibits hereinafter set forth and mentioned shall be admitted as true and correct, and that, subject to objection for incompetency, the same shall stand as evidence and facts herein without further proof, reserving however, to each party the right to introduce any other evidence not inconsistent therewith.

16 I

During the taxable year 1934 Petitioner was a resident of Pittsburgh, Pennsylvania, and filed his individual income tax return with the Collector of Internal Revenue at Pittsburgh,

Pennsylvania. His return was made on the cash basis. Petitioner's return showed a gross income of $127,949.40, a net income of $117,286.19 and total tax of $38,869.24, credit of $112.50 for income taxes paid to a foreign country, and a balance of tax of $38,756.74. Petitioner took credit on his return for a personal exemption of $2,500.00 and $400.00 for dependents. Petitioner's profession was that of accountant.

II

The taxes in controversy are income taxes for the calendar year 1934 in the amount of $3,232.13, being the amount of the deficiency asserted by the Respondent. The notice of deficiency was mailed to the Petitioner on November 9, 1937, and the petition herein was duly filed on February 5, 1938.

III

On December 29, 1930, the Petitioner, O. G. Richter, established
a trust making The Union Trust Company of Pittsburgh,
17 a corporation of the Commonwealth of Pennsylvania, trustee thereunder and naming his wife, Nannie C. Richter, the beneficiary of the net income arising under the trust—a copy of such trust instrument being attached hereto and marked Exhibit A.

IV

On June 3, 1932, an amendment to the trust instrument dated December 29, 1930, was executed by the petitioner and The Union Trust Company of Pittsburgh, as trustee—a copy of such amendment being attached hereto marked Exhibit B.

V

If called, the Petitioner would testify as follows:

"I at no time had any agreement or arrangement or understanding with my wife that at any time prior to the termination of the trust by its own time limits she would join with me upon my request for an earlier termination of the trust. She at no time entered into any agreement with me for the earlier termination of such trust and I at no time made any request upon her, and she never made any offer to join with me in so doing."

VI

The entire net income derived from said trust, as amended, from the date of its creation to the date of its termination, including the

year 1934, was paid by the trustee to Nannie C. Richter, the beneficiary thereof.

18

VII

The Petitioner's wife, Nannie C. Richter, died on November 26, 1935. The Federal income tax return of said Nannie C. Richter for the calendar year 1934 included therein the income derived from such trust as gross income.

VIII

Said trust, as amended, remained unrevoked and unmodified during the year 1934.

IX

The bonds, with unpaid coupons attached, which formed a part of the corpus of the trust were delivered to and held by the trustee until the termination of the trust and the stocks which formed a part of the corpus of the trust were delivered to the trustee and were transferred to the trustee and held by the trustee in its own name as such trustee until the termination of the trust, which termination took place upon the death of the wife of the Petitioner, Nannie C. Richter, on November 26, 1935.

X

The Petitioner is entitled to a credit of $112.50 because of foreign taxes paid by him on dividends of $2.250.00 from sources in the Dominion of Canada.

19

XI

In case the Board finds the income from the trust is not taxable to Petitioner, then it is agreed that Petitioner is not entitled to a credit of $70.90 as shown in the deficiency notice, for tax paid at the source by the trustee under the trust.

RICHARD H. WILMER,
Richard H. Wilmer,
DOUGLAS L. HATCH,
Douglas L. Hatch,
Attorneys for Petitioner.
J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

20 *Exhibit A to stipulation*

KNOW ALL MEN BY THESE PRESENTS

That I, O. G. Richter, of the City of Pittsburgh, County of Allegheny and State of Pennsylvania (hereinafter called the Donor) for and in consideration of the sum of One (1.00) Dollar to me in hand paid by The Union Trust Company of Pittsburgh, a corporation of the Commonwealth of Pennsylvania, having its principal place of business in the City of Pittsburgh, county and state aforesaid, at and before the ensealing and delivery hereof, receipt of which is hereby acknowledged, have granted, bargained, sold, transferred, and set over, and by these presents do grant, bargain, sell, transfer, and set over, unto the said The Union Trust Company of Pittsburgh, and its successors, the securities listed in Schedule A hereto attached and made a part hereof, in trust, nevertheless, for the following uses and purposes, and none other:

To have and to hold the said securities and investments into which the same may hereafter be converted and make sale thereof when deemed advisable, and invest and reinvest the proceeds of such sales from time to time in such investments as it may deem safe and profitable without being limited to those investments designated by the laws of the Commonwealth of Pennsylvania as legal investments for trust funds; and to collect, re-

21 cover, and receive the interest, income, dividends, and profits upon the same for and during the term of this agreement as hereinafter set forth; and, after paying thereout the necessary expenses of management of the trust fund including the Trustee's compensation, to pay over the balance of said interest, income and profits to Nannie C. Richter, wife of the Donor herein, in such installments as she may request.

For the purpose of determining the income distributable to the beneficiary under the terms of this agreement, all profits on sales of securities, all dividends other than stock dividends, including liquidating dividends whether paid in cash or property to the extent that the same would be taxable for income tax purposes under the present or any future income tax law of the United States, and all other gains or profits which would under the present or any future income tax law be subject to tax, shall be considered as income distributable to the beneficiary under the terms of this agreement.

This agreement and the moneys, securities, and properties which are now or hereafter may be subjected hereto, are made subject to the following further conditions, to wit:

The Donor reserves the right to terminate this trust at any time during the continuance hereof with the consent of the beneficiary, and not otherwise, by giving thirty days notice in

writing of his intention so to do, accompanied by the written consent of the beneficiary, served upon the Donor, which thirty day period of notice may be waived by the Trustee, and, upon the exercise of this power of revocation, this trust shall and the moneys, securities, and properties then held under the terms hereof, shall be transferred, assigned and delivered to the Donor, or his nominee or nominees, and the receipt of the said Donor, or his nominee or nominees, shall be full and sufficient discharge of the Trustee with respect thereto.

In the event that this trust is not sooner terminated as above provided, it shall end on January 3, 1936, and the original corpus and additions, if any made thereto subsequently by the Donor, shall be paid, assigned, transferred, and delivered to the Donor as hereinbefore provided; and, in the event of the death of the Donor or the cestui que trust during the continuance of this trust, such decease shall operate as a revocation and the original corpus and any additions, if any made thereto subsequently by the Donor, shall be transferred, assigned, and paid over to the Donor or his legal representatives, discharged of the trust herein.

The Donor reserves the further right to subject additional moneys, securities, or other properties to the terms hereof by depositing the same with the Trustee which shall be held, managed, and disposed of in all respects as though transferred at the time of the execution hereof.

The Trustee shall not be liable for loss by depreciation of any of the securities transferred at the execution hereof, or hereafter added to this trust by the Donor, nor upon those investments made by the Trustee in accordance with the provisions of this agreement.

SCHEDULE A

The compensation of the Trustee shall be three (3%) per centum on the gross income and shall be payable at the time or times the income is disbursed in accordance with the terms hereof.

In witness whereof, the Donor has hereunto set his hand and seal and the Trustee has caused its corporate seal to be hereunto affixed, duly attested, at Pittsburgh, Pennsylvania, this 29th day of December A. D. 1930.

[SEAL] (Signed) O. G. RICHTER

THE UNION TRUST COMPANY OF PITTSBURGH,

By (Signed) D. V. PARKINSON, *Vice President.*

Witness:

(Signed) G. A. WILLIAMS.

Attest: (Signed) F. J. HILL,
Ass't Secretary.

(Initialed.)
C. E. Y.

6–$1,000—The American Rolling Mill Company, 5% Sinking Fund Gold Debentures, due January 1, 1948. Coupons due July 1, 1931 and all subsequent attached. Nos. 112 to 117 inclusive.

5–$1,000—General Motors Acceptance Corporation, Ten-Year Sinking Fund 6% Coupon Gold Debentures, due February 1, 1937. Coupons due February 1, 1931 and all subsequent attached. Nos. 21936 to 21940 inclusive.

5–$1,000—Pittsburgh Railways Company, 6% Car Trust Gold Bonds, due February 1, 1932. Coupons due February 1, 1931 and all subsequent attached. Nos. M1450 to M1454 inclusive.

5–$1,000—Standard Power and Light Corporation, 6% Gold Debentures, due February 1, 1957. Coupons due February 1, 1931 and all subsequent attached. Nos. M140 to M144 inclusive.

5–$1,000—Aluminum Company of America, 5% Sinking Fund Debenture Gold Bonds, due March 1, 1952. Coupons due March 1, 1931 and all subsequent attached. Nos. 56393 to 56397 inclusive.

4–$1,000—Commonwealth Subsidiary Corporation, 5½% Gold Debentures, Series A, due September 1, 1948. Coupons due March 1, 1931 and all subsequent attached Nos. M17498 to M17501 inc.

5–$1,000—Siemens & Halske Stock Corporation and Siemens-Schuckertwerke Company, Limited, Twenty-Five Year 6½% Sinking Fund Gold Debentures, due September 1, 1951. Coupons due March 1, 1931 and all subsequent attached. Contingent Additional Interest coupons due May 1, 1931 to May 1, 1936 attached. Nos. M9312 to M9316 inclusive.

5–$1,000—The Bell Telephone Company of Pennsylvania, First and Refunding Mortgage 5% Gold Bond, Series C, due October 1, 1960. Coupons due April 1, 1931 and all subsequent attached. Nos. M46968 to M46972 inc.

10–$1,000—Detroit City Gas Company, First Mortgage 5% Gold Bonds, Series B, due October 1, 1950. Coupons due April 1, 1931 and all subsequent attached. Nos. M17389 to M17398 inc.

5–$1,000—West Penn Power Company, First Mortgage 5½% Gold Bonds, Series F, due October 1, 1953. Coupons due April 1, 1931 and all subsequent attached. Nos. 6888 to 6892 inclusive.

5–$1,000—American Gas and Electric Company, 5% Gold Debentures, due May 1, 2028. Coupons due May 1, 1931 and all subsequent attached. Nos. M16672 to M16676 inclusive.

10–$1,000—Duke-Price Power Company, Limited, First Mortgage Six Per Cent Sinking Fund Gold Bonds, Series A, due May 1, 1966. Coupons due May 1, 1931 and all subsequent attached. Nos. 665 to 674 inclusive.

5–$1,000—American Water Works and Electric Company, Incorporated, 6% Gold Debenture, Series A, due November 1, 1975. Coupons due May 1, 1931 and all subsequent attached. Nos. M7554 to M7558 inclusive.

26 5–$1,000—Lone Star Gas Corporation, Fifteen-Year 5% Sinking Fund Debenture Gold Bonds. Due May 1, 1942. Coupons due May 1, 1931, and all subsequent attached. Nos. 9952 to 9956 inclusive.

5–$1,000—The Pennsylvania Railroad Company, Forty-Year 5% Secured Gold Bonds. Due November 1, 1964. Coupons due May 1, 1931, and all subsequent attached. Nos. 21629 to 21633 inclusive.

10–$1,000—Frick-Reid Supply Corporation, Fifteen-Year 6% Sinking Fund Gold Debentures. Due June 1, 1943. Coupons due June 1, 1931, and all subsequent attached. Nos. M2499 to M2508 inclusive.

5–$1,000—Gulf Oil Corporation of Pennsylvania, Fifteen-Year 5% Debenture Gold Bonds, due December 1, 1937. Coupons due June 1, 1931, and all subsequent attached. Nos. 19828 to 19832 inclusive.

15–$1,000—Philadelphia Company, 5% Secured Gold Bonds, Series A. Due December 1, 1967. Coupons due June 1, 1931, and all subsequent attached. Nos. M27488 to M27497 inclusive, M41302 to M41306 inclusive.

5–$1,000—West Penn Power Company, First Mortgage 5% Gold Bonds, Series G, due June 1, 1956. Coupons due June 1, 1931, and all subsequent attached. Nos. 228 to 232 inclusive.

27 10 shares—Aluminum Company of America, 6% Cumulative Preferred Stock.

25 shares—Jones & Laughlin Steel Corporation, Cumulative 7% Preferred Stock.

100 shares—Koppers Gas and Coke Company, 6% Cumulative Preferred Stock.
100 shares—Lone Star Gas Corporation, Cumulative 6½% Preferred Stock.
100 shares—Oil Well Supply Company, Convertible 7% Cumulative Preferred Stock.
110 Shares—Public Service Corporation of New Jersey, Common Stock.
50 shares—The West Penn Electric Company, 6% Cumulative Preferred Stock.
50 shares—West Penn Power Company, 7% Cumulative Preferred Capital Stock.

28 *Exhibit B to stipulation*

Whereas, O. G. Richter has heretofore, to wit under date of December 29, 1930, executed a certain trust agreement wherein The Union Trust Company of Pittsburgh is Trustee, and Nannie C. Richter, wife of the said O. G. Richter, is beneficiary; and

Whereas, said trust agreement provides, inter alia, as follows: "In the event that this trust is not sooner terminated * * * it shall end on January 3, 1936, and the original corpus and additions, if any made thereto subsequently by the Donor, shall be paid, assigned, transferred and delivered to the Donor * * *", and

Whereas, it is the desire of the Donor to amend the said trust agreement so that the same shall be extended for the further period of two years from the said date of January 3, 1936.

Now, therefore, it is mutually agreed between the parties hereto that the said agreement of December 29, 1930, be and the same hereby is amended with respect to that part thereof as above quoted so that the same shall read as follows:

"In the event that this trust is not sooner terminated as above provided it shall end on January 3, 1938, and the original corpus and additions, if any made thereto subsequently by the Donor, shall be paid, assigned, transferred and delivered to the Donor * * *".

29 In witness whereof, O. G. Richter has hereunto set his hand and seal and The Union Trust Company of Pittsburgh has caused these presents to be executed by its Vice Presi-

dent and its common corporate seal to be hereunto affixed, duly attested, this 3rd day of June A. D. 1932.

[SEAL] (Sgd.) O. G. RICHTER,
THE UNION TRUST COMPANY OF PITTSBURGH,
[CORPORATE SEAL]
By (Sgd.) D. V. PARKINSON,
Vice President.

Witness:
(Sgd.) CHARLES E. YOUNG.
Attest:
(Sgd.) W. H. WILLS,
Assistant Secretary.

[Initialed]
CEY.

30 Before United States Board of Tax Appeals

Docket No. 92208

O. G. RICHTER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Douglas L. Hatch, Esq., for the petitioner.
Hugh Brewster, Esq., for the respondent.

Memorandum opinion

ARUNDELL: The respondent added to petitioner's income for 1934 the amount of income received by a trust created by petitioner, and disallowed a credit for foreign taxes. These adjustments resulted in a deficiency in income tax in the amount of $3,232.13. The parties have stipulated that the petitioner is entitled to a credit of $112.50 because of foreign taxes paid by him on dividends of $2,250 from sources in the Dominion of Canada. The issue left for decision is whether the trust income is taxable to the petitioner under Section 166 of the Revenue Act of 1934. We adopt by reference the stipulated facts as our findings of fact, and give here only a summary of them.

The petitioner in 1934 was a resident of Pittsburgh, Pennsylvania, and filed his income tax return with the collector there. By a trust instrument dated December 29, 1930, the petitioner placed a group of securities in trust with the Union Trust Company of Pittsburgh to pay the net income therefrom to the petitioner's wife

for the duration of the trust. Provision for termination was as follows:

"The Donor reserves the right to terminate this trust at any time during the continuance hereof with the consent of the beneficiary, and not otherwise, by giving thirty days notice in writing of his intention so to do, accompanied by the written consent of the beneficiary, * * *".

Unless the trust were terminated under the above provision it was to continue until January 3, 1936, (later extended to January 3, 1938) or until the death of either the petitioner or his wife prior thereto. On termination the corpus was to revert to the petitioner or his legal representatives. The petitioner did not at any time have any agreement with his wife that she would join with him upon his request for a termination of the trust prior to the time limited for its termination. The petitioner at no time asked his wife to join in an agreement for termination and she at no time offered to join with him in any agreement therefor. The petitioner's wife died on November 26, 1935.

The trust was in full force and effect throughout the year 1934, and the entire net income of the trust for that year was paid by the trustee to the petitioner's wife.

The respondent, in adding the trust income to petitioner's income for 1934, has proceeded on the theory that section 166 of the Revenue Act of 1934 makes the trust income taxable to the grantor of the trust. We have held otherwise in cases squarely in point on the facts. Meredith Wood, 37 B. T. A. 1065; affirmed per curiam May 29, 1939; John Edward Rovensky, 37 B. T. A. 702; Daniel P.
31 Woolley, 39 B. T. A. —. In accordance with our holdings in the cited cases we hold here that the trust income was not taxable to the petitioner for the year 1934.

A stipulated adjustment as to a credit for tax paid at the source by the trustee will be made in the recomputation.

Decision will be entered under Rule 50.

Entered June 12, 1939.

32 Before United States Board of Tax Appeals, Washington

Docket No. 92208

O. G. RICHTER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the Memorandum Opinion of the Board entered June 12, 1939, the respondent herein having on July 11, 1939, filed

a recomputation and the petitioner having on July 17, 1939, filed an acquiescence therein, now therefore, it is

Ordered and decided: That there is no deficiency in income tax for the taxable year 1934.

Enter:

Entered July 24, 1939.

(Signed) C. R. ARUNDELL, *Member.*

33 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

[File endorsement omitted.]

Petition for review and assignments of error

Filed Oct. 13, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John W. Smith, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

JURISDICTION

That the petitioner on review is the duly appointed, qualified and acting Commissioner of Internal Revenue, hereinafter referred to as the Commissioner, appointed and holding his office by authority of the laws of the United States; that the respondent on review, O. G. Richter, hereinafter referred to as the taxpayer, is an individual residing at 5454 Kipling Road,
34 Pittsburgh, Pennsylvania, and filed his Federal income tax return (Form 1040), for the calendar year 1934 with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Pittsburgh, Pennsylvania, whose office is within the jurisdiction of this Honorable Court; that the Court in which the review of this cause is sought is the United States Circuit Court of Appeals for the Third Circuit.

The Commissioner files this petition for review pursuant to the provisions of Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110, as amended by Section 603 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 873, Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286, and Section 519 of the Revenue Act of 1934, c. 277, 48 Stat. 680, 760.

II

NATURE OF CONTROVERSY

The nature of the controversy is as follows, to wit:

On December 29, 1930, the taxpayer executed a deed of trust whereby he transferred certain securities to the Union Trust Company of Pittsburgh, Pennsylvania, as trustee, the net income therefrom to be paid to taxpayer's wife, Nannie C. Richter, for the duration of the trust. The trust was to continue until January 3, 1936. By a separate agreement dated June 3, 1932, the term was extended to January 3, 1938, or until the death of either the taxpayer or his wife prior thereto. Upon termination, the
35 corpus of the estate was to revert to the taxpayer or his legal representatives. Under the terms of the trust instrument the taxpayer reserved the right to terminate the trust at any time during the continuance of the trust with the consent of the beneficiary by giving thirty days' notice in writing to the trustee, of his intention to do so, accompanied by the written consent of the beneficiary.

On November 9, 1937, the Commissioner mailed to the aforesaid taxpayer a notice of deficiency in Federal income taxes for the calendar year 1934 in the amount of $3,232.13. In arriving at said deficiency, the Commissioner determined that the net income in the amount of $5,872.56 for the calendar year 1934, arising from the trust, was taxable to the taxpayer for the year when earned inasmuch as he, as the grantor of the trust, remained, in substance, the owner of the property producing the income within the meaning of the provisions of Section 166 of the Revenue Act of 1934, 48 Stat. 680 (U. S. C. Title 26, Section 166) and Article 166–1 of Regulations 86, as amended by Treasury Decision 4629, C. B. XV–1, page 140 (1936) relating to revocable trusts.

On February 5, 1938, the taxpayer filed a petition with the United States Board of Tax Appeals from the deficiency as set forth in the notice of deficiency aforesaid, alleging that the Commissioner's determination was incorrect for the reason that the trust continued unrevoked throughout the calendar year 1934,
and, under the terms of the trust instrument, the income
36 arising therefrom was not taxable to the taxpayer, irrespective of the provisions of said instrument and its amendment, providing for revocation or reversion of the corpus of the trust estate to the taxpayer or his legal representatives. The Commissioner filed his answer to the petition on April 6, 1938. The proceedings came on for hearing before a division of the Board on December 6, 1938. On June 12, 1939, the Board entered its memorandum opinion wherein it held that the trust income was

not taxable to the taxpayer within the meaning of Section 166 of the Revenue Act of 1934, supra.

On July 24, 1939, the Board entered its final order of redetermination wherein and whereby it ordered and decided that there is no deficiency in Federal income tax for the calendar year 1934.

III

ASSIGNMENTS OF ERROR

The Commissioner being aggrieved by the conclusions of law contained in the decision of the United States Board of Tax Appeals and by its final order redetermining no deficiency in Federal income tax for the calendar year 1934 desires to obtain a review by the United States Circuit Court of Appeals for the Third Circuit.

The Commissioner's assignments of error are as follows:

1. The Board erred in holding and deciding that the income arising from the trust created by the taxpayer for the benefit of his wife, Nannie C. Richter, was not taxable to him under the provisions of Section 166 of the Revenue Act of 1934, 48 Stat. 680 (U. S. C. Title 26, Section 166) and Article 166-1 of Regulations 86, as amended by Treasury Decision 4629, C. B. XV-1, page 140 (1936).

37 2. The Board erred in holding and deciding that the income derived from the trust during the calendar year 1934 was not taxable to the settlor, O. G. Richter.

3. The Board erred in holding and deciding that the terms and provisions of the trust instrument executed by the respondent on review, O. G. Richter, did not constitute a power to revest the corpus of the trust estate in the trustor within the meaning and intendment of Section 166 of the Revenue Act of 1934, 48 Stat. 680 (U. S. C. Title 26, Section 166) and Article 166-1 of Regulations 86, as amended by Treasury Decision 4629, C. B. XV-1, page 140 (1936).

4. The Board erred in entering its final order of redetermination that there is no deficiency in income tax for the calendar year 1934.

5. The Board erred in failing and refusing to enter a final order of redetermination that there is due from the taxpayer a deficiency of $3,232.13 for the calendar year 1934.

6. The Board erred in that its decision is not supported by and is contrary to the evidence.

Wherefore the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Third Circuit, that a transcript of record be prepared in accordance with the rules of said Court

and transmitted to the Clerk of said Court for filing, and that proper action be taken to the end that the errors complained of may be reviewed by said Court.

(Sgd.) SAMUEL O. CLARK, Jr.,
Assistant Attorney General,

(Signed) J. P. WENCHEL,
R. L. W.
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN W. SMITH,
Special Attorney,
Bureau of Internal Revenue.

JWS:cm. 10–12–39.

[*Duly sworn to by John W. Smith; jurat omitted in printing.*]

In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]
[File endorsement omitted.]

Notice of filing petition for review

Filed Oct. 23, 1939

To O. G. RICHTER,
5454 *Kipling Road, Pittsburgh, Pa.*

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of October, 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of October, 1939.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 20th day of October 1939.

(Signed) O. G. RICHTER,
Respondent on Review.

41 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]
[File endorsement omitted.]

Notice of filing petition for review

Filed Oct. 23, 1939

To DOUGLAS L. HATCH, Esq., and RICHARD H. WILMER, Esq.
616 Transportation Building, Washington D. C.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of October 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of October 1939.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 16th day of October 1939.

(Signed) DOUGLAS L. HATCH,
(Signed) RICHARD H. WILMER,
Counsel for Respondent on Review.

42 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]
[File endorsement omitted.]

Statement of points to be relied upon by petitioner on review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the United States Board of Tax Appeals entered July 24, 1939.

Filed April 20, 1940

Now comes Guy T. Helvering, Commissioner of Internal Revenue, the petitioner on review herein, by and through his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, and J. P.

Wenchel, Chief Counsel, Bureau of Internal Revenue, and hereby asserts the following errors which he intends to rely on in this review:

1. The Board erred in holding and deciding that the income arising from the trust created by the taxpayer for the benefit of his wife, Nannie C. Richter, was not taxable to him under the provisions of Section 166 of the Revenue Act of 1934, 48 Stat. 680 (U. S. C. Title 26, Section 166) and Article 166-1 of Regulations 86, as amended by Treasury Decision 4629, C. B. XV-1, page 140 (1936).

2. The Board erred in holding and deciding that the income derived from the trust during the calendar year 1934 was not taxable to the settlor, O. G. Richter.

43 3. The Board erred in holding and deciding that the terms and provisions of the trust instrument executed by the respondent on review, O. G. Richter, did not constitute a power to revest the corpus of the trust estate in the trustor within the meaning and intendment of Section 166 of the Revenue Act of 1934, 48 Stat. 680 (U. S. C. Title 26, Section 166) and Article 166-1 of Regulations 86, as amended by Treasury Decision 4629, C. B. XV-1, page 140 (1936).

4. The Board erred in failing to hold and decide that the income arising from the trust herein involved was taxable to the settlor under the provisions of Section 22 (a) of the Revenue Act of 1934.

5. The Board erred in failing to hold and find that for the purpose of Section 22 (a) of the Revenue Act of 1934, the settlor continued to be the owner of the corpus of the trust instrument herein.

6. The Board erred in entering its final order of redetermination that there is no deficiency in income tax for the calendar year 1934.

7. The Board erred in failing and refusing to enter a final order of redetermination that there is due from the taxpayer a deficiency of $3,232.13 for the calendar year 1934.

8. The Board erred in that its decision is not supported by the evidence.

44 9. The Board erred in that its decision is contrary to law and regulations.

(Sgd.) SAMUEL O. CLARK, Jr.,
Assistant Attorney General,
(Signed) J. P. Wenchel,
(Sgd.) J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within statement of points is hereby admitted this 19th day of April 1940.

DOUGLAS L. HATCH,
Counsel for Respondent on Review.

JWS:cm. 4-15-40.

45 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

[File endorsement omitted.]

Designation of portions of record, proceedings and evidence to be contained in the record on review

Filed April 20, 1940

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Third Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Third Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of all proceedings before the Board.

2. Pleadings before the Board:

(a) Petition including copy of deficiency letter—Exhibit A. (Exhibits B and C are duplicates of Exhibits A and B attached to stipulation of facts—Item 3).

(b) Answer.

3. Stipulation of facts with Exhibits A and B attached.

4. Opinion entered June 12, 1939.

5. Decision entered by the Board on July 24, 1939.

46 6. Petition for review together with proof of service of notice of filing petition for review and of service of petition for review.

7. Order enlarging time for the preparation of the evidence and for the transmission of the record.

8. Statement of Points to be relied upon.

9. This designation of portions of record, proceedings and evidence to be contained in the record on review.

Said transcript is to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Third Circuit.

(Signed) J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within designation of portions of record, proceedings and evidence to be contained in the record on review is hereby admitted this 19th day of April, 1940.

DOUGLAS L. HATCH,
Counsel for Respondent on Review.

JWS:cm. 4-15-40.

47 *In United States Circuit Court of Appeals for the Third Circuit*

[File endorsement omitted.]
[Title omitted.]

Objection to inclusion of "Statement of Points" in Record on appeal

Filed April 20, 1940

Now comes the Respondent on Review, O. G. Richter, by and through his attorneys, and respectfully objects to the inclusion in the Record on Appeal in this case of the Statement of Points, included in the "Designation of Portions of Record, Proceedings and Evidence to be Contained in the Record on Review," filed by the Petitioner on Review as Item 8 thereof. In support of such objection, the Respondent on Review respectfully submits that the Petitioner on Review heretofore filed its Petition for Review and Assignments of Error on or about October 13, 1939, and there was therein contained in said Petition on Review Assignments of Error. The Statement of Points sought to be included in
48 the Record undertakes to assign and raise additional and further grounds for the review of the decision herein of the United States Board of Tax Appeals to those contained in the aforesaid Assignments of Error and presents additional and further legal propositions not presented to the United States Board of Tax Appeals. The Petitioner further objects on the grounds that the rules of the United States Circuit Court of Appeals for the Third Circuit do not require "a concise statement of the points on which he [the Petitioner] intends to rely on the appeal" since the Petitioner on Review has designated for inclusion the complete record and all the proceedings and evidence in the action other than unnecessary and inconsequential matters which are not material to the appeal and which the rules contemplate should not be included.

Respondent on Review respectfully reserves his right to move to have said Statement of Points stricken from the Record.

RICHARD H. WILMER,
DOUGLAS L. HATCH,
Attorneys for Respondent on Review.

Service of a copy of the within Objection to Inclusion of "Statement of Points" in Record on Appeal is hereby admitted this 20th day of April A. D. 1940.

J. P. WENCHEL,
Counsel for Petitioner on Review.

49 *In United States Circuit Court of Appeals for the Third Circuit*

[Title omitted.]
[File endorsement omitted.]

Designation of additional portions of the record to be included in record on appeal

Filed April 20, 1940

To the Clerk of the United States Board of Tax Appeals:

You will please include in the Portions of the Record, Proceedings and Evidence to be contained in the Record on Appeal, in addition to that material designated by the Petitioner on Review, the following documents:

1. Objection to Inclusion of "Statement of Points" in Record.
2. Petition for Review and Assignments of Error.

RICHARD H. WILMER,
DOUGLAS L. HATCH,
Attorneys for Respondent on Review.

Service of a copy of the within Designation of Additional Portions of the Record to be Included in the Record on Appeal is hereby admitted this 20th day of April 1940.

J. P. WENCHEL,
Counsel for Petitioner on Review.

50 [Clerk's certificate to foregoing transcript omitted in printing.]

51 In United States Circuit Court of Appeals for the Third Circuit

No. 7418

GUY T. HELVERING, PETITIONER

v.

O. G. RICHTER, RESPONDENT

Motions to strike the statement of points and to dismiss the appeal

(Filed June 13, 1940)

Comes now the respondent in the above-entitled cause, by and through his counsel, and moves the Honorable Court that (1) the Statement of Points, filed by the petitioner, be struck from the record, and (2) that the appeal herein be dismissed.

(1) In support of his Motion to Strike the Statement of Points, respondent respectfully submits that the petitioner had already,

before filing the Statement of Points, perfected his appeal by filing a Petition for Review and Assignments of Error. The petitioner cannot effectually utilize a change in the rules of the Court to raise new issues which were not presented below nor included in his Petition for Review and Assignments of Error. The Rules of the United States Circuit Court of Appeals for the Third Circuit, in Rule 19, governing review of decisions of the Board of Tax
52 Appeals, incorporate the provisions of Rule 75 of the Federal Rules of Civil Procedure. Rule 75 (d) expressly provides for a Statement of Points only if the complete record is not designated for inclusion on appeal. In the above-entitled cause, all material parts of the record have been designated. Since a Statement of Points is obviously not contemplated by the Rules in this case, respondent has filed an Objection to Inclusion of Statement of Points in Record of Appeal, and now urges that the Court strike this Statement from the record.

(2) In support of his Motion to Dismiss the Appeal, respondent respectfully submits that the petitioner has sought review in this Court of a decision of the Board of Tax Appeals holding that respondent was not liable under Section 166 of the Revenue Act of 1934 for a tax on trust income. This issue of tax liability under Section 166 was the only issue before the Board and the only specific ground upon which petitioner rested his Petition for Review and his Assignments of Error. This ground has now been abandoned by petitioner at page 7 of the Brief for Petitioner; thus, it is conceded that the respondent is not liable under Section 166. There is no other issue properly before this Court. The issue of tax liability under Section 22(a) was never raised
53 in the Board of Tax Appeals, and the Statement of Points cannot now be availed of to bring this issue before the Court. Since there is no issue left for determination, respondent moves that the appeal in this case be dismissed.

In addition to the reasons set forth above in paragraphs (1) and (2), respondent refers the Court to the discussion in Point II of the Brief for Respondent and in Support of Motions to Strike and Dismiss heretofore filed.

Respondent respectfully prays that the Honorable Court will hear argument upon these motions when the above entitled cause is called for hearing upon its merits.

Respectfully submitted.

RICHARD H. WILMER,
CARROLL WETZEL,
DOUGLAS L. HATCH.

[File endorsement omitted.]

54 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Minute entry of hearing

And afterwards, to wit, the 8th day of July 1940, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris, Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 17th day of July 1940, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

55 In United States Circuit Court of Appeals for the Third Circuit

No. 7418. October Term, 1939

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

O. G. RICHTER, RESPONDENT

On Petition to Review the Decision of the United States Board of Tax Appeals

Opinion

Filed July 17, 1940

Before MARIS, JONES, and GOODRICH, Circuit Judges.

MARIS, Circuit Judge. This is a petition to review a decision of the Board of Tax Appeals. The facts were stipulated and were adopted by the Board as its findings of fact. In December, 1930 the taxpayer created a trust, the income of which was payable to his wife. He designated a trust company as sole trustee and gave the trustee power to hold and invest the trust securities, convert and sell them, reinvest the proceeds, collect interest, income, dividends, and profits and pay the expenses of management. The trust was revocable upon notice by the taxpayer with the written consent of the beneficiary and in any event the trust was to terminate on January 3, 1936, or upon the earlier death of the

settlor or of the beneficiary, whichever should occur first. In 1932 the term was extended to January 3, 1938.

The taxpayer did not at any time have any agreement with his wife that she would give her consent upon his re-
56 quest to the termination of the trust prior to the time specified for its termination. He at no time asked his wife to consent to such termination nor did she at any time offer to give such consent. The wife died on November 26, 1935. The trust was in effect throughout the year 1934. The trustee paid the net income to the wife. The beneficiary reported the income from the trust in her income tax return for 1934 but the taxpayer did not. The Commissioner of Internal Revenue added the net income of the trust to the taxpayer's reported net income and determined a deficiency in his tax for 1934.

The taxpayer appealed to the Board. In his argument before the Board the Commissioner contended that the trust income was taxable to the settlor by virtue of section 166 of the Revenue Act of 1934, 26 U. S. C. A. Int. Rev. Acts sec. 166. The Board ruled that section 166 was inapplicable and decided that there was no deficiency. In his argument before this court the Commissioner concedes that upon authority of Helvering v. Wood, 309 U. S. 344, section 166 is inapplicable, and has abandoned that contention as a ground for reversal of the Board's decision. He now for the first time contends that the trust income was taxable to the settlor by reason of section 22 (a) of the Revenue Act of 1934, 26 U. S. C. A. Int. Rev. Acts sec. 22 (a) as interpreted by the Supreme Court in Helvering v. Clifford, 309 U. S. 331.

The issue presented to the Board was whether section 166 applied to a trust in which the estate reverted to the settlor after a period of years. The stipulated facts were framed with this issue in view. Under section 22 (a) the issue presented is whether the grantor after the establishment of the trust may still be treated as the owner of the corpus. This involves in addition to an analysis of the terms of the trust consideration of all the circumstances attendant on its creation and operation. Helvering v. Clifford, supra. Obviously many facts which would be totally
57 irrelevant to the issue which was presented to the Board might be pertinent and even determinative of the issue now sought to be raised for the first time in this court. The possibility of prejudice to the taxpayer appears to us to be self evident.

In General Utilities Co. v. Helvering, 296 U. S. 200, the Circuit Court of Appeals found in favor of the Commissioner upon a ground not raised before the Board of Tax Appeals. The Supreme Court held this to be error. It said (p. 206):

"The second ground of objection, although sustained by the court, was not presented to or ruled upon by the Board. The

petition for review relied wholly upon the first point; and, in the circumstances, we think the court should have considered no other. Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised."

Upon a petition for review of a decision of the Board this court's function is to determine whether the Board committed error in its decision of the issues presented to it. Clearly, if an issue was not presented for the Board's determination there is no action upon it by the Board which we can review. Helvering v. Salvage, 297 U. S. 106; Pfeiffer v. Commissioner, 88 F. 2d 3, affirmed 302 U. S. 247; Kottemann v. Commissioner, 81 F. 2d 621; Glassell v. Commissioner, 42 F. 2d 653. It follows that we may not consider the issue now for the first time presented by the Commissioner.

The decision of the Board of Tax Appeals is affirmed.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

58 In United States Circuit Court of Appeals for the Third Circuit

No. 7418—October Term, 1939

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

O. G. RICHTER, RESPONDENT

Judgment

Filed July 17, 1940

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby affirmed.

Philadelphia, July 17, 1940.

ALBERT B. MARIS,
Circuit Judge.

[File endorsement omitted.]

59 [Clerk's certificates to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1940

Supreme Court of the United States

Order allowing certiorari

Filed November 18, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, limited to the first question presented by the petition for the writ.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941